TAI CHOI YU

v.

THE TRIBUNAL OF THE SPECIAL COMMISSIONERS OF INCOME TAX & ANOR

HIGH COURT SABAH & SARAWAK, MIRI
ABDUL AZIZ ABDUL RAHIM JC
[ORIGINATING SUMMONS NO: 24-147-2002 (MR)]
26 MARCH 2004

CIVIL PROCEDURE: *Judge - Disqualification - Bias - Test for bias - Whether there was 'real danger of bias' - Whether appointment of judicial commissioner ultra vires the Federal Constitution - Whether judicial commissioner could discharge full functions of a High Court judge - Whether judicial commissioner's association with chairman of 1st defendant rendered him unsuitable to hear matter - Whether judicial commissioner ought to recuse himself*

CONSTITUTIONAL LAW: *Judges - Disqualification - Bias - Test for bias - Whether there was 'real danger of bias' - Whether appointment of judicial commissioner ultra vires the Federal Constitution - Whether judicial commissioner could discharge full functions of a High Court judge - Whether judicial commissioner's association with chairman of 1st defendant rendered him unsuitable to hear matter - Whether judicial commissioner ought to recuse himself*

This was an application by the plaintiff (encl. 30) requesting the judicial commissioner to recuse himself from hearing and deciding the plaintiff's application in encl. 2. The plaintiff ('the applicant') advanced several grounds, namely: (i) that there was a true danger or likelihood of bias because the judicial commissioner was under contract with the 2nd defendant and would thus be unable to act independently; (ii) that the appointment of the judicial commissioner was in violation of the constitutional concept of independence of the judiciary and *ultra vires* the Federal Constitution ('the Constitution'); (iii) that art. 122AB of the Constitution is inherently self-contradictory and that the judicial commissioner could not discharge the full functions of a judge of the High Court; and (iv) that the judicial commissioner was unsuitable to hear the matter because of his friendship and association with the chairman of the 1st defendant. The crux of this case revolved around the issue of whether the judicial commissioner ought to disqualify himself from hearing encl. 2.

Held (dismissing the application):

[1] The suggestion that the judicial commissioner could not be impartial in hearing and deciding cases involving the 2nd defendant because of his contract of appointment with the 2nd defendant, without any factual evidence of the likelihood of partiality either in the form of past decisions by the judicial commissioner in a similar situation or from his conduct of similar cases, was baseless. It was mere surmise and conjecture, and would not be enough. The element of real danger of bias is not inherent in the contractual nature of the appointment of a judicial commissioner under the Constitution. (p 133 b-c)

[2] It is provided under art. 122AB of the Constitution that a judicial commissioner is appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister after consulting the Chief Justice of the Federal Court. Since there was no evidence that the appointment of the judicial commissioner in the present case had been otherwise, the contention that the judicial commissioner's appointment was *ultra vires* the Constitution was unfounded. The Yang di-Pertuan Agong acts on the advice of the Prime Minister or the Cabinet which represents the Executive branch of the Government; thus, the applicant's contention that the JC could not be impartial or independent because of his appointment could not be a sound basis for a real danger of bias. (p 134 b-g)

[3] By virtue of art. 122AB of the Constitution, a judicial commissioner has the power to perform such functions of a judge of the High Court as appear to him to require to be performed. Article 122AB of the Constitution also provides that a judicial commissioner enjoys the same immunity as that of a High Court judge; therefore, there was no basis to the contention that art. 122AB of the Constitution is inherently self-contradictory or that the appointment of a judicial commissioner is against the concept of independence of the judiciary. (pp 134 h & 135 a, d)

[4] It was ridiculous to suggest that a judge or judicial commissioner should recuse himself from hearing a case merely on the ground of his friendship or association with a particular person or organisation without showing that such friendship or association is of a level that would likely influence the judge from being objective in his decision or handling of the case. Furthermore, the applicant's objection was considerably weakened by the fact that the judicial commissioner had not been in close contact with the chairman since 1992. (pp 135 g & 136 b)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2002] 4 CLJ 268 CA ***(refd)***

Bumicrystal Technology v. Rowstead Systems Sdn Bhd [2004] 4 CLJ 85 HC ***(refd)***

Locobail (UK) Ltd v. Bayfield Properties & Anor & Appeals [2000] 2 WLR 870 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungei Gelugor dengan Tanggungan [1999] 3 CLJ 65 ***(refd)***

Metropolitan Properties Co (FCG) Ltd v. Lannon [1969] 1 QB 577 ***(refd)***

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***

R v. Bow Street Metropolitan Stipendiary Magistrate & Ors ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577 ***(refd)***

R v. Gough [1993] AC 646 ***(refd)***

Legislation referred to:

Federal Constitution, arts. 122AB, 125

For the plaintiff - Tai Choi Yu; M/s Tai Choi Yu & Co
For the defendants - Fatnin Yusof

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Abdul Rahim JC:

In summons-in-chambers dated 19 December 2003 (encl. 30), which was heard on the same day as encl. 11, the plaintiff has asked me to recuse myself from hearing and deciding this action ie, the plaintiff's application in encl. (2). The plaintiff advanced several grounds namely:

a) there is a true danger of bias or a true likelihood of bias because being a Judicial Commissioner, I am under contract with the government of Malaysia (the 2nd defendant) for two years subject to renewal and therefore I am beholden to the 2nd defendant – the Government of Malaysia.

b) that I will not be able or am unlikely to act independently and 'have to look over my shoulders' and to act or decide in favour of the defendants in order not to prejudice the chances of my contract being renewed or that of my chances to be appointed or elevated as a full High Court Judge.

c) that my appointment as Judicial Commissioner under the said contract on the advice of the Executive branch or the Prime Minister is unconstitutional and in violation of the constitutional concept of the independence of the judiciary and such appointment is *ultra vires* the Constitution.

d) Article 122AB of the Federal Constitution is inherently self-contradictory as a Judicial Commissioner cannot perform his function fully as a High Court Judge due to the constraints of the terms and conditions of contract of the appointment. Therefore a Judicial Commissioner does not have the same powers as a High Court Judge.

e) That my long and distinguished career in the service of the 2nd defendant before being appointed as Judicial Commissioner during which time I may have represented the 2nd defendant in various capacities and that my connection and friendship with Dato' Ahmad Zaki Husin the current Chairman of the Tribunal of Special Commissioners for Income Tax makes me unsuitable to hear the matter.

The application is supported by an affidavit by the plaintiff Tai Choi Yu affirmed on 18 December 2003 in which the plaintiff basically repeated what he has stated in his grounds for the application.

When faced with an application of this nature what should a judge do? Should the judge accede to the request? Or should he throw out the application as something that is embarrassing and an abuse of the court's process? Or should he objectively consider the grounds for such application and then with all honesty and candour decide whether he could still be fair to the applicant.

There are two categories of disqualification (see *Bumicrystal Technology v. Rowstead Systems Sdn Bhd* [2004] 4 CLJ 85, 89). The first category is an automatic disqualification. That is to say a judge should, when faced with a request to recuse himself, and in the circumstances before him, withdraw from hearing the matter before him without going into further enquiry into such request. Normally this happens when on the face of it, it is so apparent that the judge cannot, in eyes of the public, be seen to act fairly to the parties in the case before him in which the request is made. Cases in this category should be rare. This is so because for this to happen it must be obvious on the face of the record that the judge has a pecuniary or proprietary interest in the subject matter before him or that he has an interest in the outcome of the case that he is being ask to hear and decide. The second category of cases is that where the judge need not accede to the request without first considering the reasons for the request. In this category, the disqualification is not automatic. But the judge, before deciding to withdraw from hearing the case, should ask the applicant to show why and how on those reasons he ie, the applicant believes that the judge cannot be impartial in discharging his judicial functions in the case. If the applicant fails to do that then the judge should not recuse himself. A judge has a sworn duty to administer and to do justice according to the

law of the land and the Constitution. Therefore unless there is a compelling reason for the judge to do otherwise, the judge should discharge that sworn duty without fear or favour.

How does the applicant show to the judge that he ie, the judge, should not preside and hear the case. A quick survey of the authorities suggests that the applicant must show that there is a real likelihood of bias on the part of the judge if he hears the case. This is the accepted test. But what does this test mean? In *Metropolitan Properties Co (FGC) Ltd v. Lannon* [1969] 1 QB 577, 599 Lord Denning MR explained as follows:

> ... In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as he could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.

In the same case Lord Denning also said that there must appear to be a real likelihood of bias and, citing the case of *Reg. v. Camborne Justices, ex p Pearce* and the case of *Reg. v. Nailszvorth Licensing Justices, ex p Bird*, he said "Surmise or conjecture is not enough."

However recent developments in this area of the law in England seem to suggest that a more stringent test of a **real danger of bias** is applied before a judge recuses himself. In *R v. Gough* [1993] AC 646, 670, a House of Lords decision, Lord Goff said:

> Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there is a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.

This test was followed in *R v. Bow Street Metropolitan Stipendiary Magistrate & Ors ex p Pinochet Ugarte (No. 2)* [1999] 1 All ER 577 and *Locobail (UK) Ltd v. Bayfield Properties And Anor & Appeals* [2000] 2 WLR 870.

The real danger of bias test enunciated by *R v. Gough* above was followed by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungei Gelugor dengan Tanggungan* [1999] 3 CLJ 65 and *Mohamed Ezam bin Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701. In the case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [2002] 4 CLJ 268, the Court of Appeal

also applied the same test and, in formulating the test in that case, seems to suggest that the bias factor is what would appear to the reasoned and well informed member of the public that there is a real possibility of bias by reason of the facts raised in an application to have a judge to recuse himself.

In my view whatever the test may be, be it real likelihood of bias or that of real danger of bias, the burden is on the applicant to show that if the judge against whom recusal is requested does not recuse himself, the impression on the mind of a reason and well informed public is that the hearing or trial would not be fair because the impartiality of the judge, in the circumstances, is being questioned. This burden is a heavy one. If the applicant can discharge this burden then the judge should without further hesitation recuse himself from hearing the case.

Returning to the instant application, I do not think it comes within the first category of cases that I have mentioned. In the first place I have no pecuniary interest or propriety interest in the matter before me for which I have been asked by the applicant to recuse myself. In the second place I am neither interested in the outcome of the case nor am I going to be affected by whatever decision the court would make upon hearing the matter.

In my view this application comes within the second category of cases of disqualification. Therefore I will proceed to consider the grounds advanced by the applicant for my recusal.

I will take grounds (a) and (b) together because they are closely related. The main complaint in these two grounds is that my appointment as a judicial commissioner is a contractual one. Therefore I will be indebted to the 2nd defendant or to use the expression by the applicant I would be "beholden" to the 2nd defendant lest I would jeopordise my chances of elevation to a full judge. For that reason, according to the applicant, I would always be "looking over my shoulders" before making any decision that is likely to be adverse or in any way affect the 2nd defendant.

To be honest about it, every judicial commissioner I think would be looking forward to the day that he or she would be elevated to the position of a High Court Judge. To deny that would be a lie. However I do not, even for a moment, think that just because of that expectation of being a judge, a judicial commissioner would compromise his judicial role to administer justice according to the law and the Constitution and bring disrepute to the Judiciary which consists of body of judges by making a decision, in the glare of public, that is biased and without regard to the evidence and facts before him. Any person who entertains such a perception should be looked upon with contempt because

that person imputes on a judicial commissioner that the latter has no conscience about doing justice in a situation where his personal interest is at stake. I believe the conscience of every judicial commissioner on the importance of dispensing justice without fear or favour, regardless of who appears before him, is crystal clear the moment he took the solemn oath of his office under the Constitution. It is this conscience and the oath of the office that guide a judicial commissioner (and for that matter anyone who sits in the seat of justice) to discharge his judicial duty with impartiality. Thus in my opinion to suggest that a judicial commissioner could not be impartial in hearing and deciding cases involving the 2nd defendant because the appointment of a judicial commissioner is contractual, without any factual evidence of the likelihood of partiality either in the form of past decisions by the judicial commissioner in the same situation or from his conduct of similar cases, the suggestion is baseless. To echo the words of Lord Denning it is mere 'surmise and conjecture'. And that is not enough. The element of real danger of bias is not inherent in the contractual nature of the appointment of a judicial commissioner under the Constitution.

As to the grounds (c) and (d), the applicant contends that the appointment of the a judicial commissioner is *ultra vires* the Constitution and goes against the concept of independence of judiciary. It was submitted that such appointment is made at the behest, and on the advice, of the Executive Branch, in particular the Prime Minister. In this respect, the applicant further contends that art. 122AB of the Federal Constitution is inherently self-contradictory and that a judicial commissioner cannot function fully as a High Court judge because of the constraints of his or her appointment.

I do not think these two grounds have any substance as to the real danger of bias on the part of the judicial commissioner. I think the applicant is suggesting that the judicial commissioner has no authority or right to hear the applicant's case because the judicial commissioner's appointment is tainted with illegality. For the purpose of dismantling the arguments of the applicant in respect of these two grounds it is convenient to reproduce art. 122AB of the Federal Constitution below:

> 122AB. (1) For the despatch of business of the High Court in Malaya and the High Court in Sabah and Sarawak, the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may by order appoint to be judicial commissioner for such period or such purposes as may be specified in the order any person qualified for appointment as a judge of a High Court; and the person so appointed shall have power to perform such functions of a judge of the High Court as appear to him to require to be performed; and anything done by him when acting

in accordance with his appointment shall have the same validity and effect as if done by a judge of the Court, and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of that Court.

(2) The provisions of Clauses (2) and (5) of the Article 124 shall apply to a judicial commissioner as they apply to a judge of a High Court.

It is provided under art. 122AB of the Constitution that a judicial commissioner is appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister after consulting the Chief Justice of the Federal Court. It has not been shown, and applicant's affidavit in support of the application does not disclose any material facts to the contrary, that the appointment of the judicial commissioner in this instant case has been done otherwise. In the absence of the evidence to the contrary, the contention that the appointment of the judicial commissioner is *ultra vires* the Constitution is unfounded.

It is also suggested by the applicant that the judicial commissioner could not be impartial or independent because his appointment by the Yang di-Pertuan Agong is on the advice of the Executive Branch of the Government. Such suggestion, in my view, shows the applicant to be completely ignorant of one of the main fabrics of the Constitution which is that the Yang di-Pertuan Agong acts on the advice of the Prime Minister or the Cabinet which represents the Executive Branch of the Government; except in certain cases where it is expressly provided that the Yang di-Pertuan Agong may act without such advice and on His Majesty's absolute discretion. This is the concept of constitutional monarchy. This concept is enshrined in art. 40 of the Federal Constitution. If the contention of the applicant is said to be correct, does that also mean that the High Court Judges could not be impartial and independent because their appointments are also by the Yang di-Pertuan Agong on the advice of the Prime Minister after consulting the Conference of Rulers? The answer is certainly not. Thus it is can be seen that the appointment of judges and judicial commissioners by the Yang di-Pertuan Agong on the advice of the Prime Minister after consulting the relevant authority as provided in the Constitution cannot be a sound basis for a real danger of bias.

Next, the applicant contends that the judicial commissioner could not be independent and impartial because he could not discharge the full functions of a judge of the High Court. I think this is a preposterous contention. A plain reading of the art. 122AB above clearly provides that '... and the person so appointed shall have the power to perform such functions of a judge of the High Court as appear to him to require to be performed; and anything done by him when according in accordance with his appointment shall have the same

validity and effect as if done by a judge of that court, **and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of the court**" (emphasis added). This provision certainly put beyond shadow of doubt that a judicial commissioner may perform the same function as that of a High Court judge.

Still on the same issue, the applicant also contended that the appointment of the judicial commissioner is an affront to the concept of independence of the judiciary and that art. 122AB is inherently self contradictory. As to the concept of independence of the judiciary, it is the perception by the public as well as that of the judges that members of the judiciary could discharge their judicial functions in administering and dispensing justice without fear and favour; and that no retaliatory actions would taken against them in the performance of their judicial functions. One of the reasons for this confidence in the independence of the judiciary is the guarantee of certain immunities by the Constitution to the office of the High Court judge. In this regard, the provisions of art. 125 of the Constitution should be of interest; especially cl. (9) of that article. In this respect it is to be noted that art. 122AB provides that a judicial commissioner enjoys the same immunities as that of a High Court judge. Therefore I do not think there is any basis in the contention that art. 122AB is inherently self-contradictory or that the appointment of a judicial commissioner is against the concept of independence of the judiciary.

The last ground advanced by the applicant is that I should not hear the case because of my association with the Chairman of the 1st defendant, Dato' Zaki Hussin. I do not deny that I know Dato' Zaki. In fact I consider him a friend. We did, at one point of time, work, together as officers in the Drafting Division of the Attorney-General Chambers. However such association is not a ground for recusal of a judge or a judicial commissioner unless it can be shown that the association would have unduly influenced the judge or the judicial commissioner in the eyes of a reasoned and informed public. As it was said in one case, judges and judicial commissioners are human beings too. They have to, and indeed, interact among themselves and among members of their communities. That means they are likely to have friends, associates and acquaintances. It is ridiculous therefore to suggest that a judge or a judicial commissioner should recluse himself merely on the ground of his friendship or association with a particular person or body or organization without showing that such friendship or association is of the level that is likely to influence the judge from being objective in his decision or handling of the case. In the case of *Locobail (UK) Ltd v. Bayfield Properties And Anor & Other Appeals* [2000] 2 WLR 870, the Court of Appeal in England said at pp. 887-888 as follows:

> We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, not that of any members of the judge's family; or previous political association ... .

The above passage lends support to what I have said earlier that mere friendship or association without more is not a sound basis for the objection. Furthermore, it is matter of fact, which the applicant did not bother to investigate and verify, that since 1992 I have not been in close contact with Dato' Zaki Hussin. The time that has passed since then weakens the objection considerably.

In the circumstances and, for the above reasons, I dismissed the applicant's application in encl. 30 with costs.